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## REMARKS

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## REMARKS BY LOWELL BECK\*

### I. THE TWENTY-FIFTH AMENDMENT

Birch Bayh spent much of his younger years working on his grandparents' farm, excelling in sports, *and* entering politics at an early age—he was elected to the Indiana legislature at twenty-six and became the youngest ever Speaker of the Indiana House of Representatives.<sup>1</sup> At age thirty-four, he took on the three-term Senator Homer Capehart and beat him for the U.S. Senate term beginning in 1963.<sup>2</sup>

It was this young Indiana farm boy and athlete who would forge remarkable political achievements by authoring the Twenty-Fifth<sup>3</sup> and Twenty-Sixth Amendments<sup>4</sup> and, as you know, other very significant landmark legislation, such as Title IX,<sup>5</sup> which prohibits discrimination on the basis of sex in any federally funded educational program or activity.<sup>6</sup>

In the Senate, among other responsibilities, Senator Birch Bayh was a member of the Senate Committee on the Judiciary's Subcommittee on Constitutional Amendments.<sup>7</sup> The subcommittee's chairman, Senator Estes Kefauver, died without warning after suffering a heart attack on the Senate floor in August 1963. Senator Bayh, thinking that the subcommittee would be terminated, was surprised when the chairman of the Committee on the Judiciary, Senator James Eastland, decided to keep it and appoint him, a truly freshly minted senator, the chairman.<sup>8</sup>

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\* Former Assistant Director of the American Bar Association's Washington, D.C., office. These remarks were made during the Symposium entitled *Celebrating the Impact of Senator Birch Bayh: A Lasting Legacy on the Constitution and Beyond*, hosted by Fordham Law School's Feerick Center for Social Justice on October 16, 2019, at Fordham University School of Law. The text of these remarks has been lightly edited and footnoted. For an overview of the corresponding Tribute, see *Foreword: Celebrating the Impact of Senator Birch Bayh: A Lasting Legacy on the Constitution and Beyond*, 89 FORDHAM L. REV. 1 (2020).

1. Robert Sherrill, *Birch Bayh Isn't a Household Word—Yet*, N.Y. TIMES (Feb. 15, 1970), <https://www.nytimes.com/1970/02/15/archives/birch-bayh-isnt-a-household-wordyet-senator-birch-bayh.html> [<https://perma.cc/9QVX-TRB4>].

2. Adam Clymer, *Birch Bayh, 91, Dies; Senator Drove Title IX and 2 Amendments*, N.Y. TIMES (Mar. 14, 2019), <https://www.nytimes.com/2019/03/14/obituaries/birch-bayh-dead.html> [<https://perma.cc/JF6G-4WLU>].

3. U.S. CONST. amend. XXV.

4. U.S. CONST. amend. XXVI.

5. 20 U.S.C. §§ 1681–1688.

6. Clymer, *supra* note 2.

7. BIRCH BAYH, ONE HEARTBEAT AWAY: PRESIDENTIAL DISABILITY AND SUCCESSION 29 (1968).

8. *Id.* at 28–29.

Here he was, newly elected to the Senate, a subcommittee chairman. But, the subcommittee no longer had an office or even funds.<sup>9</sup> Other more senior senators swooped in to take the coveted space for themselves.<sup>10</sup> So, he organized it out of his own office, with his own staff and office funds, preparing for a time when it might have an active agenda, if ever.<sup>11</sup> The subcommittee didn't have an active agenda, although Senator Kefauver and his Republican counterpart, New York's Kenneth Keating, had coauthored a presidential succession plan that would have simply given Congress the power to establish procedures in the case of a president's inability to act.<sup>12</sup> That was similar to the American Bar Association's (ABA) proposal at that time, and the ABA had testified to that effect.<sup>13</sup> But the parent Committee on the Judiciary's agenda was full, and there wasn't any committee time for a constitutional amendment proposal.<sup>14</sup>

Little did Senator Bayh know that in a few weeks, the subcommittee would take front and center in Congress. And, although we, the small staff in the ABA's Washington, D.C., office, were doing some work on the association's Twenty-Fifth Amendment proposal, the subject was not a priority.<sup>15</sup> It soon would be.

President John F. Kennedy's assassination on November 22 brought to light quickly that a constitutional amendment was needed.<sup>16</sup> For years, the issue of presidential inability had been discussed and debated to no avail.<sup>17</sup> But, this time the urgency was clear. President Kennedy had died, and it was clear that the vice president would take over. But, what if he had lingered for any length of time, let's say, in a coma? The Constitution had no provision for who would serve as president if the sitting president were unable to perform the responsibilities of office. The country would have been in crisis.

At that time, a partnership to take action to get the Twenty-Fifth Amendment adopted developed between Senator Bayh and his staff and Donald Channell, the director of the ABA's Washington office, and myself, the assistant director.<sup>18</sup> The entire leadership of the ABA gathered around to support the effort, with the strong support of Lewis Powell Jr., who was in line to be president of the association—and later was appointed Associate Justice of the U.S. Supreme Court.<sup>19</sup>

Senator Bayh provided the energy and enthusiasm to get it accomplished. He strongly favored writing procedures into the amendment, a different

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9. *Id.* at 29.

10. *Id.*

11. *Id.*

12. *Id.* at 27–28, 350.

13. *Id.* at 27.

14. *Id.* at 92.

15. *See id.* at 42–43.

16. *See id.* at 8–11.

17. *See id.* at 12–27.

18. *Id.* at 42–43.

19. *Id.* at 63–64.

approach than the ABA's.<sup>20</sup> And he prevailed in changing the ABA's position, which paved the way for us to go to work, and provide the most knowledgeable scholarship through authorities such as Paul Freund and John Feerick, and provide back home support through local and state bar associations and a multitude of young lawyers around the country.<sup>21</sup> It took one and a half years from our first meetings in 1963 until the Senate and House voted in 1965 to send the amendment to the states for ratification. And another one and half years for ratification.

Most of us who worked so closely with Senator Bayh during those years know that it was his perseverance and personal hands-on attention that ensured the Twenty-Fifth Amendment was enacted. He didn't just introduce the bill and hold some hearings. He persuaded the influential Republican Senator Keating and Republican leader Senator Everett Dirksen to support the procedures approach and brought key House members along as well.<sup>22</sup> He met tirelessly with individual members of Congress and opinion leaders in Washington and around the country.

Now, this effort wasn't a slam dunk by any means. As months elapsed after the assassination, public—and even Congressional—interest faded somewhat, and it wasn't ever an issue that voters were that highly interested in or knowledgeable about.<sup>23</sup> But, this amendment was Birch Bayh's baby, and he didn't let up. He absolutely loved the effort.

The venerable Senator Sam Ervin said about Senator Bayh's grand achievement:

If it had not been for the perseverance, the patience, and the willingness to compromise which was manifested on a multitude of occasions by the junior Senator from Indiana, we would never have gotten the resolution out of the subcommittee, much less through the full Judiciary Committee and then through the conference with the House.<sup>24</sup>

For me, Senator Ervin's comment was the essence of Senator Bayh's very being. His true legacy in getting legislation accomplished is a model for every politician today. He accomplished so much on landmark issues because he knew the importance of working closely with all members of Congress and "crossing the aisle," as they say. A practical approach, which is not so prevalent today.

## II. THE TWENTY-SIXTH AMENDMENT

Also of great importance was Senator Bayh's authorship and shepherding of the Twenty-Sixth Amendment, which lowered the voting age at the federal and state levels to eighteen.<sup>25</sup> Without in any way diminishing its importance, it did not require the same attention for enactment that the

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20. *Id.* at 66.

21. *See id.* at 66–70.

22. *Id.* at 324.

23. *See id.* at 35, 96–98.

24. 111 CONG. REC. 15,595 (1965) (statement of Sen. Sam Ervin).

25. *See* U.S. CONST. amend. XXVI.

Twenty-Fifth did. The public wanted it.<sup>26</sup> While the Vietnam War was the tipping point for it, bringing on the strong and emotional view that “if you’re old enough to fight in a war, you’re old enough to vote,” it wasn’t that simple.<sup>27</sup> In addition to serving in the U.S. Armed Forces, millions of those aged eighteen to twenty-one were in the labor force and paying taxes. The federal government permitted young men and women of eighteen to enter the federal civil service.

In 1970, Congress and the U.S. Supreme Court created a chaotic situation for the 1972 elections. A federal law lowering the voting age in all elections to eighteen was passed,<sup>28</sup> but the Supreme Court ruled that this could apply only to federal elections.<sup>29</sup> Unless all states immediately lowered their voting ages, there would have been a hodgepodge of voting requirements for eighteen-year-olds. So, the more direct and preferred method was to amend the Constitution.

While John W. Gardner’s Common Cause, where I was then executive director, had not played a role in securing the initial federal law, it utilized its telephone bank mechanism and spokespersons to reach voters in all states to lobby their state governments.<sup>30</sup> Senator Bayh led this effort, and because the issue already had been so thoroughly discussed by Congress, in March 1971 the amendment rapidly passed the Senate, 94 to 0<sup>31</sup> and the House, 400 to 19.<sup>32</sup> It became part of the Constitution on July 5, 1971.<sup>33</sup> Ratification was completed quicker than any amendment in history.<sup>34</sup>

So, here we have it. A young senator who came to Washington and was the only senator since the Founding Fathers to author two amendments to the Constitution of the United States. This is the thing of legends.

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26. THOMAS H. NEALE, CONG. RSCH. SERV., 83-103 GOV, THE EIGHTEEN YEAR OLD VOTE: THE TWENTY-SIXTH AMENDMENT AND SUBSEQUENT VOTING RATES OF NEWLY ENFRANCHISED AGE GROUPS 6 (1983).

27. See Robert Longley, *The Twenty-Sixth Amendment: Voting Rights for 18-Year Olds*, THOUGHTCO., <https://www.thoughtco.com/the-26th-amendment-4157809> [<https://perma.cc/J22Q-BCPF>] (last visited June 22, 2020).

28. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (codified as amended in scattered sections of 52 U.S.C.).

29. *Oregon v. Mitchell*, 400 U.S. 112, 130–31 (1970).

30. See *Our Impact*, COMMON CAUSE, <https://www.commoncause.org/our-impact/> [<https://perma.cc/R92Z-JMZ3>] (last visited June 22, 2020) (“In 1971, we led the campaign that won the 26th amendment to the U.S. Constitution, allowing 18 year-olds to vote.”).

31. See 117 CONG. REC. 5830 (1971).

32. See *id.* at 7569–70.

33. NEALE, *supra* note 26, at 15. Ratification by the states was complete by July 1, 1971, but the amendment was not duly certified until July 5, 1971. *Id.*

34. Eric S. Fish, *The Twenty-Sixth Amendment Enforcement Power*, 121 YALE L.J. 1168, 1194 (2012).